PUBLIC PROSECUTOR

v.

ALEX BIN HAMZANI

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[CRIMINAL TRIAL NO. K 47-01 OF 1993]
21 FEBRUARY 1995

DANGEROUS DRUGS*: Trafficking in cannabis - Quantitative tests - Adequacy - Chemist only subjecting 10% of total weight of cannabis amounting to 43.5 grams to tests - Whether adequate quantity tested - Whether presumption of trafficking could arise - Whether offence could only be one of possession - Dangerous Drugs Act 1952 ss. 2, 37(d), 37(da)(vi), 37(j), 39A(2).*

The accused was charged with trafficking in dangerous drugs, to wit 398.8 grams of cannabis, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (DDA). The facts showed that the chemist, having carried out a 100% visual examination of the plant material, had as usual subjected the same to three further tests, namely, the microscopic examination, the Dequenois Levine test and the Thin Layer Chromatography test. However in conducting these tests the chemist had only used 43.5 grams of the plant material, believing, that he had thereby met the ten percentum requirement of sample analysis as prescribed by s. 37(j) of the DDA.

Before the learned Judicial Commisioner the accused argued that the method as adopted by the chemist was faulty and defective and that the tests had not conclusively established that the whole 398.8 grams of the plant materials were cannabis as defined by s. 2 of the DDA. According to the accused, no presumption of trafficking could ever arise under the circumstances because 200 grams of cannabis, as required by s. 37(da)(vi) DDA, had also not been proved beyond reasonable doubt.

Held:

[1] Section 37(j) of the Dangerous Drugs Act, 1952, when it talks about "ten percentum", does not refer to the quantity of the substance but to the number of the receptacles holding the substance. It cannot therefore be true that if a chemist conducts chemical tests on a quantity of 10% of a total, that is sufficient or that satisfies the test of "adequate quantity".

[2] All that is required in this case is for the chemist to scoop a few more twigs of the plant material to make up 200 grams of sample which the chemist could then, beyond any reasonable doubt, say that the 200 grams of plant material he examined and analysed was cannabis and thus would trigger the presumption of trafficking.

[3] On the facts the charge against the accused ought to be, and is hereby amended to one of possession of 43.5 grams of cannabis under s. 39A(1)(f) of the DDA.

[Charge amended accordingly. Accused sentenced to 5 years imprisonment and 6 strokes of the rotan upon pleading guilty to amended charge].

Cases referred to:
PP v. Mohammad bin Ambunani [1994] 4 CLJ 871 (foll)
Leong Bon Huat v. PP [1993] 2 AMR 37:2136 (refd)

Legislation referred to:
Dangerous Drugs Act 1952 ss. 2, 37(d), 37(da)(vi), 37(j) & 39A(2)

For the prosecution - Hassan bin Abdul Ghani DPP
For the accused - Adnan bin Hj. Puteh; M/s. Tsai, Cheu Adnan.

JUDGMENT

Tee Ah Sing JC:

In this case, Alex bin Hamzani (the accused) was charged as follows:

> That you, Alex bin Hamzani is charged at the instance of the Public Prosecutor, Malaysia and the charge against you is as follows:
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> > That you, on 19 February 1992, at about 11.30 a.m., at Jalan Luyang Baru, in the District of Kota Kinabalu, in the State of Sabah, on your own behalf, did traffic in dangerous drugs, to wit 398.8 grammes of cannabis, and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (revised 1983) and punishable under s. 39B(2) of the same Act.

According to the prosecution's case on 18 February 1992 DPC Khaidir bin Ibrahim (PW2) received information that a male person was selling cannabis in Jalan Bundusan not far from Popular Super Store. On receiving the said information on 18 February 1992 at about 9.00 pm PW2 together with D/Cpl. Mohd Awang and D/Cpl, Mohd Jeffry went to the said place.

At the said place PW2 met the accused. PW2 negotiated with the accused to buy cannabis. The accused ask for a one ringgit note (P9) from PW2 and tore the said one ringgit note into two. PW2 was given one portion and the accused retained the other portion. The accused told PW2 that if the one ringgit note did not match he (the accused) did not want to complete the transaction.

So it was agreed between the accused and PW2 that the sale and purchase of the cannabis will be done on 19 February 1992 behind Popular Super Store at about 9.00 am.

On 19 February 1992 at about 8.30a.m. two teams of police went to the said place in two cars. In the first team the members of the party were PW2, D/Cp1. Mohd. Awang, DPC Mohd. Jeffry and PC Waris. In the second team the members of the party were ASP Roland Unai Limar (PW3), PC Sikim and PC Jamil.

On arrival PW2 stopped his car at the Esso Station and D/Cpl. Mohd. Awang and D/Cpl. Waris got down from the car. PW2 then drove his car to the back of Popular Super Store. DPC Mohd. Jeffry was seated besides him. The other police party led by PW3 then took their ambush positions.

While PW2 and D/Cpl. Mohd. Jeffry were seated in the car parked behind Popular Super Store the accused came near them and showed a portion of a one ringgit note. Both portions matched. PW2 also showed the accused money amounting to RM1,000. The accused told PW2 to wait for half an hour.

Later the accused came back and asked PW2 why were there many people there. PW2 replied that he did not know them. The accused then requested PW2 to move to another place.

So PW2 drove his car together with D/Cpl. Mohd. Jeffry to the junction of Kg. Baru and waited. Half an hour later the accused came to where PW2 and D/Cpl. Mohd Jeffry were. The accused was seen carrying a bag by both PW2 and PW3.

The accused told PW2 that there were only 58 packets of cannabis because he had no time to pack. And PW2 told the accused to bring back the cannabis and have the required quantity of cannabis whether packed or not packed.

Then at about 11.20am the accused came to where PW2 and D/Cpl. Mohd. Jeffry were. The accused was carrying a bag and he showed the bag to PW2.

The accused also showed to PW2 cannabis which had not been packed. PW2 then came out of the car and told the accused that they count together.

While D/Cpl. Mohd. Jeffry were counting the cannabis carried by the accused PW2 identified himself as a police officer and arrested the accused. PW2 then examined the bag. He found inside the bag dried leaves suspected to be cannabis.

PW3 did see the accused carrying a bag walking towards the car driven by PW2 which was parked at Jalan Bundusan. PW3 also observed the accused moved away from the car. Later the accused came to the car carrying a bag and entered the car. PW3 says PW2 got out of the car. Later PW3 saw D/Cpl. Mohd. Jeffry came out of the car and assisted PW2 arrest the accused. PW3 and the other police personel then rushed to the place of arrest to give the assistance.

PW3 did examine the bag (P10). Inside the bag PW3 found two black plastic bags each containing dried leaves suspected to be cannabis.

On arrival at the Balai Polis Karamunsing PW3 lodged a police report (P11) while PW2 handed over all the exhibits to Insp. Wan Kim Guan (PW4).

On 19 February 1992 at about 12.05 PW4 received 58 plastic packets containing dried leaves in a black plastic bag and another black plastic bag containing dried leaves. He also received one red bag (P10). And all the exhibits were locked by PW4 in a cabinet in PW4's office.

On 20 February 1992 at about 11.20 a.m. PW4 took out the exhibits to be marked. He marked one black plastic bag as AA1(P5). Inside AA1(P5) there were 58 packets of plastic containing dried leaves and he marked these as A1 to A58 respectively (P6A1 to A58). The second black plastic he marked as AA2(P7). P7 contained dried leaves (P8). PW4 then wrapped P5 and P7 into a bundle (P4) with brown wrapping paper. He then marked X on the brown wrapping paper (P3). He then sealed P3 with Polis Di Raja Malaysia No. 313 seal. Then he put back P3 in his cabinet and locked it.

On 20 February 1992 at about 3.40 pm he took out P3 from the locked cabinet and handed P3 to the Government Chemist (PW1) for analysis. PW1 analysed the dried leaves.

PW1 found the dried leaves in exhibits P6A1 to P6A58 to contain 176.20 grams of cannabis and in exhibit P8 to contain 222.60 grams of cannabis.

After analysing PW1 wrapped back the exhibits in the same manner as submitted using the same wrapper. He then sealed it with the wax seal of the Jabatan Kimia Cawangan Sabah Malaysia. PW1 kept theexhibits in his personel locker which was locked. On 6 March 1992 PW1 handled back P3 to PW4.

PW1 carried out a 100% visual examination of the contents (P6A1 to A58) in P5 and he found the contents to be of one type of plant material bearing the gross-features of cannabis. He then took out sufficient representative sample (18.5grams out of 176.20grams) to conduct three further tests namely the microscopic examination which he found the plant material to bear the characterstics morphological features of cannabis. Secondly he conducted the Duquenois Levine test. Thirdly he carried out the Thin Layer Chromatography test. It was based on the four test namely visual examination, microscopic examination, Duquenois Levine test and the Thin Layer Chromatography test that he came to the conclusion that the 176.20 grams of plant material to be cannabis as defined under s. 2 of the Dangerous Drugs Act 1952.

PW1 further testified that from his examination and analysis he found the resin was intact and had not been extracted from the plant material.

He also carried out examination and analysis on the plant material (P8) in P7. After conducting 100% visual examination of the plant material weighing 222.60 grams, microscopic examination, Duquenois Levine test and the Thin Layer Chromatography test he concluded that the 222.6 grams of plant material to be cannabis as defined under s. 2 of the Dangerous Drugs Act 1952. The representative sample he took out for the three tests was 25 grams. He also found the resin to be intact and had not been extracted.

In cross-examination PW1 stated that the 18.5 grams of plant material was divided into three portions for the three tests. He did not weigh the individual portions.

Section 37(d) of the Dangerous Drugs Act, 1952 reads as follows:

> Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall until the contrary is proved be deemed to have known the nature of such drug.

PW2 has testified that he saw the accused carried the red bag (P10) which contained P5, P6 A1 to A58, P7 and P8.

The accused brought the bag to the place where PW2's car was parked. This was confirmed by PW3 who saw the accused carrying a bag.

After the accused was arrested PW3 confirmed that he saw the red bag (P10). Inside P10 he found P5 which contain P6A1 to A58. Inside P10 he also found P7 which contained P8.

I am of the view that the accused was in possession of P10 wherein the cannabis were found. Therefore the presumption arises that the accused knew the red bag (P10) he was carrying contained cannabis.

The next issue is has the prosecution laid the ground work to invoke the presumption of trafficking under s. 37(da)(vi) of the Dangerous Drugs Act, 1952.

In *PP v Mohammad bin Ambunani* [1994] 4 CLJ 871 His Lordship Ian Chin J at p. 875 stated:

> For the purpose of this exercise I will first remind myself of what I have said in the unreported case of *PP v. Amir bin Dupa* (High Court, Tawau, Criminal Trial No. T (41) 6 of 1994, 11 August 1994), the relevant part of my judgment I reproduce here, viz:
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> It is against those evidence of the chemist which I just set out that I have to decide whether, to use the words of *Leong Bon Huat v. PP* [1993] 2 AMR 37: 2132, at p. 2136, "the samples of plant material upon which the chemist had carried out the chemical tests, were adequate

having regard to the total weight of the plant material". A recital in some detail of the judgment of *Leong Bon Huat v. PP* is necessary to see how the chemist in our case performed compared to the chemist in that case. The Supreme Court in that case, at p. 2135 has this to say:

> It will be seen that he made no mention of the results of his physical examination, for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the the Court as to what were the tests he conducted using chemical methods; for example, did he resort to the Dequenois Levine test and/or the Thin Layer Chromatography test? If so, what were the results of those tests?

I will pause here to say that the chemist in our case did all that was neglected by the chemist in that case as highlighted in the just quoted judgment. The judgment of the Supreme Court continues in the following terms:

> But, more importantly, under re-examination by the Deputy Public Prosecutor the chemist said this:
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> > I did not obtain the weight of each sample taken out but the total weight of samples taken for analysis is more than 10% of the net weight of 793.85 gms.
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> And it was only in answer to the Court, at the end of his re-examination that he said:
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> > The dried plant matter is cannabis as defined in s. 2 of the DDA Act 1952. I examined it in accordance with the definition in the DDA 1952.
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> But the crucial point was whether the grounds upon which he arrived at the conclusion could withstand the test of strict curial scrutiny.
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> It is obvious that from the extracts of the testimony of the chemist, the following plain facts emerge:
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> First, the total weight of the plant material said to be cannabis was 793.85 grammes.
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> Second, the total weight of the samples taken for analysis was "more than 10% of the net weight of 793.85 gms" of plant material.
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> Third, the chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis.
>
> Now, what does "more than 10% of the net weight of 793.85 gms" mean? Does it mean 11% or 12% or 13% or more than that? Not to put too fine a point on it, the expression "more than 10% is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.
>
> To take the point a little further, if by the expression "more than 10% of the net weight of 793.85" means a little more than 10% - and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning - then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more 79.30 gms of cannabis, which would be well below the statutory minimum of 200 gms of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

Pausing again, I would remark that every criticism made there by the Supreme Court could aptly apply to our case. The only difference in the facts is that in our case the nett weight is 809 grams while in that case it is 793.85 grams but then it makes no difference because in both cases, "more than 10% of the net weight" would in any event be under 200 grams. Reverting again to the judgment, it continues in this way:

> It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take matter further and establish beyond any reasonable doubt that was so. This further step would, of necessity have involved, the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests, were adequate having regard to the total weight of the plant material, for the reasons stated.

> It seems to me, from the said judgment of the Supreme Court that the Court has, in each case, to decide what constitutes "adequate quantities" upon which tests must be conducted to determine beyond reasonable doubt whether a plant material is cannabis or not."

And at p. 874 his Lordship stated:

> Here, as in the said unreported case which I have just referred to I am faced with the issue, to quote "Whether the samples of plant material upon which the chemist had carried out the chemical tests, were adequate having regard to the total weight of the plant material... The most adequate quantity is without doubt an amount which is not less than 200 grams that being the quantity requried for invoking the presumption of trafficking...
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> In the first place, s. 37(j) of the Dangerous Drugs Act, 1952, when it talks about "ten percentum", does not refer to the quantity of the substance but to the number of the receptacles holding the substances. It cannot therefore be true that if a chemist conducts chemical tests on a quantity of 10% of a total, that is sufficient or that satisfies the test of "adequate quantity". If this is not so, I see no reason why the Supreme Court (as it was then called) should, in *Leong Bon Huat v. PP*, state that what constitutes adequate quantity would depend on the circumstances of each case, when it could have, but did not, simply hold, if that is the law, that 10% of the total quantity would be an adequate quantity. All that is required in this case is for the chemist to scoop a few more twigs of the plant material to make up 200 grams of sample which the chemist could then, beyond any reasonable doubt and not mere probability, say that the 200 grams of plant material he examined and analysed was cannabis and thus would trigger the presumption of trafficking. The plant material are available in this case for the chemist to top up the sample from 184 grams to 200 grams but he did not do so. I do not think the Court is asking a lot, but only the best available and beyond reasonable doubt evidence, when it demanded a mere 16 grams more of sample in exchange for a man's life. Knowledge and trafficking are already to be presumed under the law I see no reason why the evidence for establishing that 200 grams of the plant material was cannabis was established by probative evidence through the examination and chemical testing of a part, not exceeding 200 grams, of the plant material, when it can be ascertained beyond reasonable doubt by the examination and the conduct of chemical testing on 200 or more grams of the plant material.
>
> It was for the reasons stated that I was of the view that the presumption of trafficking had not arisen because the 200 grams of cannabis had not been established beyond reasonable doubt. I accordingly, on 6 October 1994, amended the charge to one of possession of 184 grams of cannabis, under s. 6 read with s. 39A(2) of the Dangerous Drugs Act, 1952, and called upon the accused to enter upon his defence.

I agree with the reasons given by His Lordship Ian H.C. Chin J in the case of *PP v. Mohammed bin Ambunani* [1994] 4 CLJ 871 and I hereby adopt it to apply to our present case.

The most important issue I have to decide is "whether the samples of plant material upon which the chemist had carried out the chemical tests, were adequate having regard to the total weight of the plant material." (See *Leong Bon Huat v PP* [1993] 2 AMR 37:2132 at p. 2136).

The most adequate quantity is without doubt an amount which is not less than 200 grams that being quantity required for invoking the presumption of trafficking. In this case the quantity upon which the chemical tests were conducted was of 43.5 grams which was 156.5 grams short of the 200 grams required by s. 37(da)(vi) of the Dangerous Drugs Act 1952.

I am of the view that as far as quantitative test is concerned by using just 43.5 grams out of 398.8 grams to find out the weight of cannabis present is certainly not conclusive.

I am of the view that the chemist should have conducted chemical testing on 200 or more grams of the plant material to prove beyond reasonable doubt that the weight was 200 or more grams of cannabis.

In view of the above reasons I am of the opinion that the presumption of trafficking had not arisen because 200 grams of cannabis had not been established beyond all reasonable doubt.

I accordingly amend the charge to one of possession of 43.5 grams of cannabis under s. 6 read with s. 39A(1) of the Dangerous Drugs Act 1952 and called upon the accused to enter his defence.

After the amended charge was read to the accused, the accused pleaded guilty. I then sentenced him to 5 years imprisonment with effect from date of arrest and 6 strokes of the rotan.

Amended Charge

That you, Alex bin Hamzani is charged at the instance of the Public Prosecutor, Malaysia and the charge against you is as follows:

That you, on 19 February 1992, at about 11.30 a.m., at Jalan Bundusan in the District of Kota Kinabalu, in the State of Sabah, did have in your possession dangerous drugs, to wit 43.5 grammes of cannabis and that you not being a person authorised in accordance with an authorisation as referred to under s. 4 or 5 of the Dangerous Drugs Act 1952 and that you have thereby committed an offence under s. 6 of the Dangerous Drugs Act 1992 (revised 1983) and punishable under s. 39A(1)(f) of the same Act.